

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOYCE MATTUCCI)	
Claimant)	
VS.)	
)	Docket Nos. 213,286 & 225,025
WESTERN TEMPORARY SERVICES & HOBBY LOBBY STORES, INC.)	
Respondents)	
AND)	
)	
TRAVELERS INSURANCE COMPANY & CONTINENTAL CASUALTY COMPANY)	
Insurance Carriers)	

ORDER

Both claimant and respondent, Western Temporary Services, appeal from a preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish (ALJ) on August 26, 1997.

ISSUES

Claimant injured her right upper extremity on April 12, 1996, while working for Western Temporary Services (Western). Claimant then settled the claim for this injury in November 1996. Future medical treatment was left open. Claimant left Western in May of 1996.

In May 1997, approximately one year after leaving Western, claimant began working for Hobby Lobby. She now contends she has suffered a new injury or injuries at Hobby Lobby, injuries to both upper extremities. She has filed a new claim, Docket No. 225,025, and seeks medical treatment and temporary total benefits from Hobby Lobby and its insurance carrier.

A preliminary hearing was held on August 7, 1997, to consider her request. At the preliminary hearing, respondent Hobby Lobby contended claimant had not suffered a new

injury and argued that if claimant needs medical treatment it is for the injuries she sustained at Western.

The ALJ entered an Order, dated August 7, 1997, continuing the preliminary hearing. The ALJ also advised claimant of her right to use the unauthorized medical to obtain an opinion as to the cause of the current symptoms and then indicated the hearing would be reset after giving notice to Western.

After the ALJ's Order, claimant's counsel filed an application for review and modification of the claim against Western, and also filed a motion for additional medical treatment in the case against Western. An application for preliminary hearing had been filed in the case against Western by previous counsel. Claimant was also seen and evaluated by J. Mark Melhorn, M.D., after the first preliminary hearing.

A second preliminary hearing was then held on August 26, 1997. Both Western and Hobby Lobby appeared by counsel. Claimant's counsel presented a report from Dr. Melhorn and counsel for both respondents were given an opportunity to cross-examine claimant.

The ALJ then entered the currently appealed Order on August 26, 1997. The Order provided for medical treatment at the expense of Western and its insurance carrier and denied the request for temporary total disability. By implication, the Order denied the request for benefits from Hobby Lobby.

In the above-described context, both claimant and Western appeal. Both contend the ALJ erred in failing to order benefits paid by Hobby Lobby. Both contend the evidence establishes a new accidental injury arising out of and in the course of employment with Hobby Lobby.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Order by the ALJ should be affirmed.

As above indicated, claimant settled a claim against Western in November 1996 and, as a part of the settlement, left open future medical treatment. The settlement was based on a 32 percent loss of use of the right forearm. Claimant contends that, in the course of her subsequent employment with Hobby Lobby, she sustained additional injury. The ALJ found claimant had not established a new injury but that claimant continued to suffer from and need medical treatment for her injuries at Western. The Appeals Board agrees.

Claimant began working for Hobby Lobby in late May 1997. She was assigned to work at the cash register and contends this work, handling the purchased items and operating the cash register, caused additional injury. She contends that from the work at Hobby Lobby she has increased pain and swelling in her right hand, including a burning and tingling sensation, pain in her right shoulder she did not have before, new constant pain in the elbow, and pain in her left arm she had not had before.

The medical records reflect, however, claimant was receiving ongoing treatment at the time she went to work for Hobby Lobby. On April 2, 1997, before going to work for Western in May 1997, claimant saw Dr. J. Stanley Jones for bilateral hand problems. Claimant admitted at the second preliminary hearing her condition had worsened in April of 1997. Prior complaints, shown in the records of Dr. Jones, also include complaints of pain in the right shoulder and elbow. Claimant had, prior to going to work for Hobby Lobby, scheduled an appointment to see Dr. Melhorn. When she saw Dr. Melhorn on June 19, 1997, she did not mention left side complaints and did not mention work at Hobby Lobby. Her complaints at that time did include the right elbow but she attributed the problem to her work for a temporary services company, presumably Western, not Hobby Lobby.

The Board notes Dr. Melhorn concluded claimant had suffered new injury from her work at Hobby Lobby. It appears, however, Dr. Melhorn did not have a complete history of the complaints claimant was having shortly before going to work for respondent. Dr. Melhorn's opinion was necessarily based on the information provided by claimant.

To a significant degree, the decision in this case is based on an evaluation of the credibility of the testimony. Claimant's testimony would, if accepted, support an award against Hobby Lobby. Even though she has had many of the same complaints before going to work for Hobby Lobby, claimant identified new complaints to different parts of the body. The ALJ did not find that testimony credible. The medical records contradict some of the testimony given. The ALJ had the opportunity to observe claimant's testimony. Based in part on the record of prior complaints and in part deferring to the ALJ's opportunity to observe the live testimony of claimant, the Board concludes the decision and Order by the ALJ should be affirmed.

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Jon L. Frobish, dated August 26, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
William L. Townsley, III, Wichita, KS
D. Steven Marsh, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director